THE LATE

Lord Ruſſel's

CASE,

WITH

OBSERVATIONS

UPON IT.

Written by the Right Honourable *HENRY*
Lord *De la Mere.*

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MDCLXXXIX.

THE CASE OF William Ld. Ruſſel,

Tryed for HIGH TREASON, *July* 13. 1683.

And afterwards EXECUTED for the ſame.

THE Indictment is very long: But for ſubſtance it is, *for Conſpiring the Death of the King, and intending to Leavy War, and to that end to Seize the Guards:* For the Indictment concludes, *and the Guards for the preſervation of the perſon of our ſaid Lord the King, to ſeize, and deſtroy, againſt the Duty of his Allegiance, againſt the Peace,* &c, *and alſo againſt the Form of the Statutes,* &c.

Thoſe that gave their Evidence againſt the Priſoner, were *Romſey, Sheppard,* and my Lord *Howard.*

The *Overt Act* of *Conſpiring the Death of the King,* is *Conſulting to Leavy War, and to that intent to Seize the Guards.* So that the Deſign to ſeize the Guards, is the *Overt Act* aſſign'd of Conſpiring the King's Death.

The *Quære* then is, Whether my Lord *Ruſſel* was Guilty of High Treaſon within the *Statute* 25 *Ed* 3. (for upon that Statute

he was tryed) And I conceive he was not; and therefore his *Attainder* ought to be Reverſed.

But before I ſpeak to the Matter of Law, on which I ſhall chiefly inſiſt, I muſt deſire you to obſerve ſome Inconſiſtencies, and Contradictions in the Evidence.

Firſt, That none of theſe perſons had their Pardons: Which was otherwiſe in the Popiſh Plot: For no perſon gave Evidence before he had his Pardon. Therefore being unpardon'd, tho' they might be *Legal*, yet not *Credible Witneſſes*: Both which are required by the Statute. For whilſt the Fear of Death attends a man, he is thinking how he may ſave his Life, rather than to ſpeak nothing but the Truth; and he that is ſo baſe to purchaſe his own Life at the price of another mans, will be ſure not to ſpeak leſs than the Truth.

Next, I obſerve how the King's Counſel, by the Queſtions they put to the Witneſſes, did lead, if not, in a manner, Dictate to them what to ſay.

And I take notice, that my Lord *Howard*, who muſt be ſuppoſed to have a full Knowledge of the Plot, yet never ſays a word of their Intent to ſeize the Guards, which was the principal thing in the Evidence of *Rumſey* and *Sheppard*: For had there been any ſuch Intent, it is ſtrange that my Lord *Howard*, who had brought in ſo many other things by Head and Shoulders, ſhould forget ſo remarkable a piece of Evidence, and ſo home as that.

This is only in general. But in Particular, do but obſerve *Rumſey's* Evidence.

He ſays, he was not there above a quarter of an hour; and whilſt he was there, two things were debated, and reſolved, and a third thing diſcourſed. Surely they were things which they did not much value; or elſe they were men of wonderful diſpatch, that could receive, and debate the Meſſage which he brought from my Lord *Shaftsbury*, then Debate the Matter of the Guards, and come to a Reſolution in both; and afterwards Diſcourſe about the Declaration; and all this in a quarter of an hour; or elſe *Rumſey* is perjured.

In the next place it is very remarkable, where he ſays, *he was not certain whether he was at another Meeting, or elſe heard Mr.* Throgmorton *make a Report of another Meeting to my Lord* Shaftsbury. And again he ſays, that *he was not certain whether he did hear ſomething about a Declaration, when he was at that meeting; or that Mr.* Ferguſon *did report it to my Lord* Shaftsbury, *that they had debated it.* To ſay no more of it, It is very ſtrange, that a man cannot be certain whether he knows a thing of his own Knowledge, or by Hear-ſay. And if in ſo plain matters as thoſe, he ſpoke on uncertain Knowledge, it is not unreaſonable to ſuppoſe that he might as eaſily be miſtaken in the reſt of his Evidence.

Then,

Then, as to *Sheppard*, He firſt ſwears point blank, that my Lord *Ruſſel* was at two Meetings at his Houſe. But being preſs'd by my Lord *Ruſſel*, he can remember but one; and when that was, he could not recollect himſelf, though not above eight or nine Months before, as he confeſſes. It's ſtrange that a man ſhould be ſo much in a wood about ſo remarkable a thing. But ſurely it muſt be hard upon the Priſoner, that the time could not be better fix'd: for if Witneſſes may give Evidence at that rate, it will be much ado for any Priſoner to make his Defence.

As to my Lord *Howard*, his Evidence is ſo notorious that I need ſay nothing of it, but refer you to the Printed Tryal for your Satisfaction. Only I will take notice of one thing which he ſays, to reconcile what he ſaid to my Lord of *Bedford*, my Lord *Angleſey* being preſent, and what he afterwards ſwore againſt my Lord *Ruſſel* at his Tryal. Says he, *Your Lordſhip knows that every man that was committed, was commited for a Deſign of Murdering the King. Now I laid hold on that part: For I was to carry my Knife cloſe between the Paring and the Apple; and I did ſay, that if I were an Enemy to my Lord* Ruſſel, *and to the Duke of* Monmouth, *and were call'd to be a Witneſs, I muſt have declared in the preſence of God and Man, that I did not believe either of them had any Deſign to Murder the King.*

As to the firſt, What he ſaid to my Lord of *Bedford*, was as to the Plot in General, and if to any particular part of it, it muſt be as to the *Inſurrection*: For there was to be my Lord *Ruſſel's* Province.

2*ly*. My Lord *Howard* knew that all that were committed, their Commitments run as well *for Levying of War, as for Conſpiring the King's Death.* So that his Lordſhip muſt find out ſomething that will reconcile himſelf to himſelf, better than his *Knife betwixt the Apple and Paring*, or elſe it will follow, That he ſolemnly ſaid one thing and ſwore another.

I have but only touch'd theſe things; becauſe I haſten on to the matter of Law. For tho' it were without contradiction, that every thing ſworn againſt my Lord *Ruſſel* were true, yet it did not amount to *High-Treaſon*.

Firſt, Becauſe a *Conſpiracy to Leavy War*, is not an *Overt Act of Imagining the Death of the King.*

In arguing of this, I will not meddle at all with the Original of *Allegiance*; nor the true Nature of it, neither make any Diſcourſe, that heretofore it was a leſs Offence to Plot againſt the King's Life, than againſt the Government; but I will leave thoſe ſore places, and endeavour to prove my Point, by conſidering theſe five things.

Firſt, Whether any Court, the Parliament excepted, can try a Man upon an Indictment for High Treaſon, that is grounded upon the Common Law?

Secondly, To what end and intent the Statute 25 *Ed.* 3. *cap.* 2. was Enacted?

Thirdly, Whether [*Conſpiring the Death of the King,*] and [*Leavying of War*] are Diſtinct Species of Treaſon?

Fourthly, Whether every Law is not to be conſtrued moſt ſtrictly, to reſtrain the Miſchief againſt which it was Enacted?

Fifthly, What is the true meaning, and ſignification of being *Provably Attainted, by Overt Deed?*

1. As to the firſt, It ſeems to be out of doubt, that at this day there can be no ſuch thing as an Indictment at Common Law for High Treaſon; though for other things there may: Becauſe there is no Precedent of it, ſince the Statute 25 *Ed.* 3. For nothing is more common, than for every Priſoner that is Arraigned for High Treaſon, to Demand, upon what Statute he is Indicted. And the Court, or King's Counſel do tell him the particular Statute. Beſides, every Impeachment before the Lords in Parliament, is grounded upon ſome Statute: And if ſo, *à fortiori,* no inferiour Court can Try a Priſoner upon an Indictment for High Treaſon grounded upon the Common Law. For the Law, which greatly delights in Certainty, eſpecially in caſe of Life, will not allow of an Indictment at Common Law: Becauſe no Iſſue can be joyn'd upon it by reaſon of the Uncertainty.

As to the 2*d. viz.* To what End, or Intent the Statute 25 *Ed.* 3*d.* was made? I thus anſwer,

Edward the 3*d.* was a Victorious Captain, and potent Prince, whereby he became very Renown'd. But that which made his Name the Greater, and his Fame the more laſting, was thoſe good and wholſome Laws which were Enacted in his time; by which he reſtored and beautified the Government, that had been defaced, and almoſt deſtroyed, by the Illegal proceedings during his Father's Irregular Reign. And of all the Oppreſſions under which the Nation Groan'd, there was none that lay heavier upon the People, than the Extravagant Licence which the Judges took in the Interpretation of *Treaſon.* And this appears by the particular, and univerſal Joy expreſſed by the whole Land at the making of the ſaid Statue. For tho' he call'd Parliaments very frequently, and none of them prov'd abortive of good Laws; yet that Parliament which was held in the 25*th* year, did more than any of the reſt. And of all the beneficial Laws that were then Enacted, the 2*d.* Statute whereby *Treaſon* was reduc'd to certainty, gave the People the greateſt cauſe to lift up their Heart and Voice in Thankfulneſs to God, and the King; becauſe the Jaws of that devouring Monſter were broken, which had torn in pieces ſo many Families, and threatned Deſtruction to the reſt. So that this Statute was made to reſtrain, and limit the Judges from calling any

any thing *Treaſon*, that might be ſo by Inference, or Implication, and only to judge upon that which is Litterally ſo within that Statute. For it is there provided, That if any ſuch like Treaſons ſhall come before any of the Juſtices, that they muſt ſtay, without going to Judgement, till the Cauſe be declared before the King and his Parliament. And all Subſequent Statutes of *Treaſon*, are all as ſo many Confirmations of this Statute. For they had been needleſs, if the Judges could have called any thing *Treaſon*, but what is Litterally ſuch within that Statute. And the Statute it ſelf had been made to no purpoſe, if it had not ſtrictly reſtrained the Judges. And my Lord Chancellor *Nottingham*, was of Opinion, that even the Lords in Parliamant could not proceed upon an Indictment for *High Treaſon*, unleſs the Fact therein alledg'd were firſt Declared by ſome Statute to be Treaſon.

3. As to the third thing, It never was, nor ever will be deny'd that *Compaſſing the Death of the King*, and *Levying of War*, are two diſtinct Species of *Treaſon*; unleſs all *Treaſons* are of the ſame Kind. But if there are ſeveral ſorts of Treaſons, then it will follow that theſe are alſo Diſtinct: Becauſe in every Statute of *Treaſon* which mentions *Conſpiring the death of the King*, and *Levying of War*, they are named Diſtinctly. Beſides, they are different in the manner of Proof: For that which is neceſſary to prove the one, does in no ſort prove the other. And furthermore, the one may be Effected, and the other never ſo much as intended, or Deſign'd. As for Example, the King may be Murder'd, and no War Levied, nor Intended. And moreover, in the one Caſe it is Treaſon, as well to Intend as to Execute it, without tacking it to any other thing: But it is not ſo in the other. For it is in it ſelf, and abſtractly from every thing elſe, *Treaſon*, as well to *Compaſs* the *King's Death*, as to *Kill* him. But an Intention to Levy War, and doing all things in order to it, is not Treaſon, unleſs the War be Levyed, Except by Implication, or Inference. And I am perſwaded that the want of obſerving that theſe are diſtinct Species of Treaſon, has been the occaſion of that Miſtake of calling a *Conſpiracy to Leavy War, an Overt Act of Conſpiring the King's Death.*

4. As to the fourth, No doubt, every Statute is to be conſtrued moſt ſtrictly to reſtrain the Miſchiefs againſt which it was Enacted. For the uninterrupted Courſe of all Judgments, and Reſolutions have been accordingly; and nothing can more directly thwart Common Senſe, than to make it otherwiſe. And therefore if the Statute be abſolute, the more forcibly it is conſtrued to reſtrain that Miſchief, the more truely is the Intent of that Statute purſued. For how ſhall any Evil be ſuppreſſed, if

the Remedy muſt be applyed but by halves? The Law then would be rather a Mockery, than a Means to redreſs the Evil, if it ſhall not be taken moſt ſtrongly againſt it. Either it is, or it is not a Reſtraint of the Grievance complained of. If it is not, why was it made? If it is, why muſt it not be underſtood in that Senſe, whereby the Miſchief, or Evil may be more Effectually ſuppreſt and prevented?

5. As to the fifth, The Anſwer will be beſt underſtood, by conſidering, firſt the ſignification of the two words apart, *viz. Provably* and *Overt*.

Provably ſignifies to prove, or make good by Evidence, Argument, Reaſon, or Teſtimony.

Overt has all theſe ſignifications, *Open, Clear, Plain, Apparent, Manifeſt, Notorious, Evident, Publick, Known, Undoubted, Certain, Perſpicuous.*

Theſe then being the ſignifications of thoſe Words, what can follow more naturally than that, To be *Provably Attainted by Overt Deed*, is, that the Fact muſt not only be Direct, Apparent, and Notorious to the Point, but it muſt alſo be proved, Clearly, Evidently, Plainly, and Perſpicuouſly, void of all Doubt, or Obſcurity? And thoſe two words being taken together, do the better expound each other, and ſeem to be choice words, and words of Art, cull'd out by the Penners of that Statute, as the moſt expreſſive to exclude all Implications, or Inference, that might be made in Caſe of *Treaſon.*

Theſe things being premis'd, which are as eaſily proved, as alledg'd, there will remain very little, beſides Shifts, and Evaſions, to prove, that a *Conſpiracy to Leavy War*, is an *Overt Act of Compaſſing the King's Death.*

The things that are chiefly, and commonly urg'd, to maintain that Opinion, are theſe two.

Firſt, It would be of dangerous Conſequence, if a *Conſpiracy to Leavy War*, may not be interpreted an *Overt Act of Compaſſing the King's Death*: Becauſe there is no means left to prevent it, and the miſchief attending it, when the War is Levyed.

Secondly, If a War be Levyed, the Death of the King muſt needs be intended, and will certainly enſue, if the Rebels prevail.

In anſwer to theſe, it may be replyed, That the one of ther is but a bare Objection, and the other no ſubſtantial Argument becauſe it begs the Queſtion; which is ſurely a feeble way of Arguing.

But I will give a more particular Anſwer to them. And it will be more proper to begin with the ſecond; becauſe in ſpeaking to it, the other will in a great meaſure receive an Anſwer.

Now as to the Second, It may be obſerv'd, that the Death of the King is made ſo certain, and neceſſary a conſequence of *Levying of War*, that by reaſon of that *certainty*, *a Conſpiracy to Leavy War*, is an *Overt Act of Compaſſing the King's Death*. If therefore the *Certainty* will not hold, but that many Caſes may be put, and inſtances produced wherein the King's Death is not intended, nor did enſue upon the prevailing of the Party, then is the whole weight and ſtrength of the Argument of no effect.

The *Hugonots* in *France* have heretofore aſſembled in Arms: And tho' they repeated it ſeveral times, yet on which of thoſe Occaſions does it appear, either by the Cauſe of their coming together in that manner, or by the Effect of it, that it was levell'd at the King's Life? No, the Cauſe of their Riſing in Arms was for the Aſſerting of their Religion, and juſt Rights. For as ſoon as their reaſonable Demands were ſatisfied, they laid down their Arms more willingly than they took them up; neither did they attempt any thing againſt the King's Life, when he was in their power; but after they were anſwer'd in thoſe things to which they had Right, both by the Laws of Nature, and the Government, immediately they return'd home in peace, and upon all other occaſions proved the moſt firm, and Loyalleſt Subjects of all other in that King's Dominions, and ſo this preſent King of *France* muſt teſtifie for them, if he will do them right.

If the Proteſtants in *France* ſhould at this time riſe in Arms upon ſo juſt a provocation as now they have, it would be ſenſeleſs to ſuppoſe, that they Levyed the War with a principal Deſign to Murder the King, and not for the Defence of themſelves and juſt Rights, which are ſo inhumanely, and againſt all Law, and Juſtice, at this time Invaded, and Raviſh'd from them. Story is full of like Caſes and Inſtances to this. But to ſpeak more particularly to *England*, What was the Barons Wars? The Anſwer to which muſt be, That they took up Arms to Aſſert their Rights, and Liberties, which the King, contrary to his Oath, withheld from them, and tho' it laſted near forty years, yet the King's Death was never intended, nor his Life in any danger. For as ſoon as their juſt Demands were anſwered, they put up their Swords, and every man return'd home, and prayed for the Life of the King. And out of *Engliſh* Story, what one inſtance can be produced, where the

Cauſe

Cauſe of War was Declared to be againſt the King's Life ; or if the party prevail'd, the King was put to Death by their general Conſent and Approbation? For tho' it be true, that there are ſome Inſtances where they have been Murder'd after the War ; yet it is alſo as true, that it was by private Aſſaſſination, and not by the Conſent and Privity of thoſe who Levyed the War. For all thoſe who were concern'd in the Murther, were afterwards Condemn'd and Executed for it, as Traytors. As in the Caſe of *Edw.* 2. and *Ric.* 2.

As for that of *Charles* the *Firſt*, which is ſo much preſs'd and urg'd, tho' the Cauſe of War had been expreſly againſt his Life; yet as one Swallow does not make a Summer; ſo neither does one Precedent prove the Point. But beſides, in that Caſe of *Charles* the *Firſt*, To infer from thence, that the King's Death is principally intended by Levying of War, is altogether as weak an Argument, as to ſay, becauſe a thing falls out by Accident, therefore that very thing was the principal Deſign, and Aim of the whole Action. For in that War thoſe who firſt took up Arms, did it to oppoſe the King's Arbitrary Practices: and though he was afterwards put to Death; yet it was altogether againſt their conſent or deſire; and moſt of the Army was againſt it, and would have prevented it, but that they were at that time ſo broken into Factions, and Parties, that they durſt not truſt one another. For after that Tragedy was acted, thoſe who firſt took up Arms, immediately upon it laid them down, and were afterwards the chief Inſtruments of the late King's Reſtoration.

But if the King's Death be the Principal thing intended by Levying of War, to what purpoſe is the War Levyed? Cannot the King be taken off more eaſily by Poiſon, or a private Aſſaſſination? To the effecting of which Opportunity cannot be wanting; and ſo with more certainty the End is Obtain'd, and a leſs hazard run in the Execution, than could be done by a War; except thoſe who Levy the War to kill the King, are not content with the Murther of him, unleſs they cut the Throats of all thoſe that would defend him. Indeed to do it by an open War, rather than by Poiſon, or a private Aſſaſſination, is the more generous way; for they give him fair warning to look to himſelf; like a Noble Enemy that ſcorns to kill his Adverſary baſely. 'Tis indeed to go round about, for the neareſt way. Therefore a War when Levyed, muſt be for ſome other Intent than to take away the King's Life: Since *Engliſh*-men, if they enjoy their Properties, no Prince is ſo Great, and Happy in the Heads, Hearts, Hands, and Purſes of his Subjects, as an Engliſh King.

But

But yet allowing that upon every War levied, the Death of the King would certainly enſue, if the Rebels prevail; yet this Queſtion does naturally ariſe, *viz.* Where is that Statute which does in expreſs terms ſay, That *a Conſpiracy to Levy War is Treaſon*? For if it be not ſo expreſly, and literally, within ſome Statute, then it is a Conſtructive Treaſon, and conſequently no ſuch Treaſon, as upon which the Judges may proceed, if the Statute of the *25th. Ed. 3d.* was made to any purpoſe. For that Statute reſtrains *all Conſtructive Treaſon, or none.* But if the Judges may in any one Caſe make a Conſtructive Treaſon, they may do it in all: And ſo we are left in the ſame uncertainty about Treaſon, as we were before that *Stat. 25th. Ed. 3d.* was made.

If the Judges might judge upon *Conſtructive Treaſon*, yet it ſeems to be a far-fetch *Conſtruction* to make a *Conſpiracy to Levy War*, an *Overt Act of Compaſſing the King's Death.* For this is not to be *Provably attainted by Overt Deed.*

Firſt, becauſe the *Conſpiring the Death of the King*, and *Levying* of *War* are two diſtinct Species of Treaſon; and therefore it would be very unnatural, and too much forc'd to joyn theſe together, and as it were, to make them one, and the ſame thing, that are ſo different, and divers, not only in the Manner, and Matter of Proof, but alſo in themſelves.

For then, *Secondly*, A Conſpiracy to commit any other Treaſon, may alſo be called an *Overt Act of imagining the King's Death*: which was never yet pretended.

Thirdly, A Conſpiring of any one Treaſon may then be an Overt Act of any other Treaſon.

Fourthly, Any other Criminal Act may then as well be call'd, *an Overt Act of Conſpiring the King's Death.*

Fifthly, This is to make *a Conſpiracy to Levy War*, Treaſon in it ſelf. For there is very little difference between calling a thing Treaſon in it ſelf, and to make it an *Overt Act* of ſome Treaſon within the Statute.

Sixthly, Becauſe a *Conſpiracy to Levy War* was not Treaſon at Common Law.

Seventhly, The Statutes of *23d.* of *Eliz.*, and the *1ſt.* and *3d. Jac. 4th.* which make it High Treaſon *to Reconcile any to the Church, or See of Rome*, or to be ſo Reconciled, were En-

acted to no purpose, if a *Conspiracy to Levy War*, is an *Overt Act of the Compassing the King's Death.* For what can tend more plainly, and directly to *Levy War*, than to perswade the People to renounce their Allegiance to the King; and to Promise Faith, and Obedience to some other Power? So that these, and all other Statutes concerning Treason, which have been made since the Statute 25*th. Ed.* 3*d.* are as so many Confirmations of it; and consequently prove that the Judges can call nothing Treason, but what is Litterally such, within that, or some other Statute.

Eightly, My *Lord Cook* says, that *Conspiracy to Levy* is not Treason unless the *War be Levy'd in facto.* And questionless his Opinion is very good Law: Because in many Cases it is not Treason to *Levy War*: *& à fortiori*, a Conspiracy cannot. For look into the Statute, *Queen Mary* 12. and there you will find several things provided against, which are plainly, and directly a *Levying of War*; and yet they are declared to be but *Felony.*

But it may be Objected, that by. *Stat.* 3. and 4. *Ed.* 6. the Offences mention'd in 1 *Queen Mary* were made Treason. It is very true: Yet it does not alter the Case, but rather prove the Point. For *First*, they being made Treason by Statute, proves that it was not so in it self: *Secondly*, because in the two next succeeding Reigns it is declared to be but Felony. For the Statute of *Queen Mary* is confirm'd by 1 *Eliz.* 16. And thereupon the Argument is the stronger; because those two Queens were of different Religions. *Thirdly*, because when a thing is declared an Offence by Act of Parliament, and is afterwards made a less Offence by Statute, it proves that it was not so great in it self; but that the necessary Circumstances of Time and Affairs requir'd it should then be such.

But the Case is yet Stronger, because in some Cases it may be but a Trespass to *Levy War*; as it was in the Case of my Lord *Northumberland*, 5 *Hen.* 4*th.* He did actually raise Forces, and such as were taken to be a *Levying of War*: For which he was question'd before the Lords, and tryed for High Treason. But tho' the Lords did find the Fact; yet they adjudg'd it but a Trespass; because the Powers raised were not against the King, but against some Subjects. This Precedent seems to carry great weight in it: *First*, because it is a Judgment given in the highest Court of Judicature: *Secondly*, because it was given so soon after the making of the Statute of 25 *Ed.* 3*d.* who must be suppos'd to understand

ſtand the intent and meaning of that Statute full as well as ſucceeding Ages.

The Caſe of thoſe who Aided Sir *John Old-Caſtle* might be alſo urg'd; who were Acquitted, becauſe in their Defence, it did appear, that by reaſon of Fear, and to ſave themſelves, they were conſtrain'd to what they did. Which is Ground for another Argument, if there were occaſion; becauſe it proves, that the Maxim in Law, *Actus non ſit reus, niſi Mens ſit rea*, holds in Caſe of Treaſon, as well as in all other Caſes. But I think there's no need of it. For if War may be Levy'd which is neither *Treaſon* nor *Felony*; it muſt be a very unnatural Conſtruſtion of a Conſpiracy to Levy War to make it an *Overt Act of Compaſſing the King's Death.*

Thus the *Second* thing Objected has received a full anſwer; and likewiſe the *Firſt*, in a great Meaſure. Yet I will add a few words; that no doubt may remain.

If the conſequence on all hands be duly conſidered, the danger will be found to lie on the other hand. Yet be it as great as can be pretended; it muſt be remembred, that the Law has ſettled the Point; and ſo it muſt ſtand, till by the ſame Authority it be altered. For the Rule in Law is not to be forgot, *Nemo Legibus Sapientior.* It is pretended that out of a tender regard which the Law and all Subjects ought to have for the King's Life, a *Conſpiracy to Levy War*, is taken to be an *Overt Act of Compaſſing the King's Death*: To this it may be anſwered, by way of queſtion, how comes it about that this Age ſhould have a greater Care of the King's Life, than our Fore-fathers had? Can it be imagin'd that they did not underſtand the nature of the Government, as well as we do? Nor did know of what conſequence, to the Publick, the Preſervation of the King's Life is? Can it be thought that they did not impartially weigh, and conſider the conſequence on all hands? Yet however let the defects be never ſo many; ſeeing it is ſettled by Law, it cannot be alter'd, but by the ſame Power: For if it may, then let the conſequences be ſeriouſly debated of leaving it in the Breaſt of the Judges to rectifie the miſtakes, or defects, be the fictitious or real. For then, when a Turn is to be ſerv'd, the Law will be ſure to be Defective; and ſo in effect, they ſhall *Legem dare.* Treaſon will then be reduced to a certainty; that is, if the Judges pleaſe; otherwiſe not: There will be then no need of Parliaments: For the Judges ſhall both declare, and make Law. What will all our Laws ſignifie, though made and penn'd with all the Wiſdom and Caution that a Parliament is capable of,

of, if the Judges are not tied up, and bound by thoſe Laws? It renders Parliaments uſeleſs, and ſets the Judges above that great Council. They can undo what the other has done. The Parliament chains up ſome unruly evil, and the Judges let it looſe again. But beſides, where is this dangerous conſequence, as is Objected? Indeed there had been ſome weight in the Objection, had a *Conſpiracy to Levy War* been wholly left unpuniſhable. But the Law has provided a puniſhment commenſurate to the Offence: Which though it does not extend to Life; yet is ſufficient to deter Men from the Commiſſion of it. Yet if a *Conſpiracy to Levy War* is to be puniſh'd in as high a degree, as a *War, when Levy'd*, this would be to puniſh Thoughts, as highly as Deeds; which if it be juſt, yet is *ſummum jus*.

Mr. Solicitor Finch twitter'd out two or three imperfect Precedents, *viz.* that of my Lord *Cobham*, *Dr. Story*, and *Plunket*. Theſe, as they are not altogether to the purpoſe, ſo they are ſo very Modern that no great regard is to be had to them: And they rather prove the Ignorance, or Boldneſs of thoſe Judges, than that a *Conſpiracy to Levy War is an Overt Act of Compaſſing the Kings Death*. Becauſe the Statute of 25 *Ed.* 3. has provided, that if any ſuch like Treaſons come before the Juſtice, they muſt tarry without going to Judgment, till the Cauſe be ſhew'd before the King, and his Parliament. And therefore for thoſe Judges to take upon them to judge upon that which was doubtful, and not litterally, nor expreſly a *Treaſon*, was to aſſume the Part which the King and Parliament had reſerved to themſelves. And therefore upon what has been ſaid, this Concluſion will follow, that no Man can (before the Judges) be Convicted of *Treaſon*, unleſs the Fact be expreſly and litterally *Treaſon* within ſome Statute, and he be thereof provably Attainted by ſome *Overt Deed*, and conſequently a *Conſpiracy to Levy War* is not an *Overt Act of Compaſſing the Kings Death*; but a Treſpaſs, or *High Miſdemeanour*: And therefore the judgment againſt my Lord. *Ruſſel* was manifeſtly unjuſt; and ſo of Courſe, it ought to be Revers'd.

If a *Conſpiracy to Levy War* were *Treaſon* of it ſelf, or an *Overt Act of imagining the Kings Death*; yet my Lord *Ruſſel* was not Guilty of *High Treaſon* within the Statute of 25 *Ed.* 3*d.* becauſe the Overt Act Aſſign'd againſt him was *His being of a Council of Six, to manage an Inſurrection*, and in order to it, to *ſeize the Guards*. For had he Actually ſeiz'd the Guards, yet it could not be *Treaſon* within the Statute 25 *Ed.* 3*d.*

Firſt,

Firſt, Becauſe the *Guards* are not ſettled by Act of Parliament, and conſequently they are no Legal Force. For the Law has pronounc'd that all ſtanding Force, other then the *Militia*, is in *terrorem populi*, Illegal, and a Grievance. And the Reaſon of it is clear; becauſe the Law does never Protect, or Countenance any thing that is, or may be, burthenſome, or that is uſeleſs. And it is ſo Evident, that in the *Penſionary Parliament*, this Vote paſs'd in the Houſe of *Commons*, *nemine contradicente*. That all ſtanding Force other than the *Militia is Illegal, and a Grievance*. And though they have the King's Commiſſion, as may be Objected; yet his Commiſſion cannot make that Lawful, that is Illegal; no more than he can tolerate a Riot, or pardon a common *Nuiſance*. For if ſeveral Perſons were Try'd for a Riot, and it manifeſtly appear upon the evidence to be ſuch, would their producing the Kings Commiſſion keep them out of the Compaſs of the Law? or ſhould thoſe who did Aſſemble together to ſuppreſs them be Guilty of *Levying of War*, becauſe thoſe other perſons had the King's Commiſſion? Therefore if my Lord *Ruſſel* had Aſſembled a Force ſufficient to ſeize the *Guards*, the moſt that could have been made of it, was to bring it within the Statute of the *1ſt. Qu. Mary* 12. which makes it but Felony. And this being duly compared with the Precedents urg'd by Mr. *Attorney*, and Mr. *Solicitor*, will retort them ſtrongly upon themſelves.

Secondly, It could not be Treaſon within the Statute, 25 *Ed.* 3*d.* becauſe at the time of making that Statute, there was no ſuch thing as the Guards. For the firſt thing of that ſort was the Band of Penſioners which *Hen. 7th.* ſet up, in imitation of what he had ſeen, and learn'd in *France*. For in *Ed.* the 3*d's* Time, tho' he was the Third that without interruption, had ſucceeded to the Crown; yet Succeſſion had not then obtain'd ſo ſacred a Reputation, as not to ſtand in need of the People to uphold them in the Throne. And therefore Kings were then too Wiſe, to do any thing that would be ſo apparent a Diſtruſting of the People, as to call in Guards to their Aid. And beſides, the conſtant Wars, either with *France*, or *Scotland*, made them ſtand continually in need of the Peoples Supplies: And therefore they would be ſure cautiouſly to avoid all things, that might give the Nation occaſion of Offence. And nothing could be more diſtaſteful to the People, than to be noſed by a ſtanding Force: which the Law had adjudged to be Illegal, and a Grievance. And therefore, as there was no ſuch things as *Guards*, at the making of that Statute 25 *Edw.* 3*d.* So that Statute cannot be ſuppoſed to take notice of them

Thirdly, If the *Guards* were Eſtabliſhed by Act of Parliament, yet if they were ſo Eſtabliſhed ſince the 25 of *Ed.* 3*d.* my Lord *Ruſſel* was not within that Statute, becauſe it provided for nothing but what was lawfully in being at the time, when it was made. So that if it were an Offence to ſeize the *Guards*, my Lord *Ruſſel* ought to have been Indicted upon that Statute, which did ſo make it an Offence. For if a Priſoner is Indicted upon a wrong Statute, and the Evidence proves nothing of that Statute, on which he is Indicted, but comes very home, and point blank to the Statute on which he ought to have been Indicted, he may plead ſpecially to it, and the Court muſt direct the Jury to bring him in *Not Guilty*.

Fourthly, My Lord *Ruſſel* was not within the Statute 25 *Edw.* 3*d.* Becauſe the Indictment concluded falſly; and more falſly than any Indictment that I ever ſaw or heard of. For it ſays, [*And the Guards for the Preſervation of the Perſon of our ſaid Lord the King, to ſeize and deſtroy againſt the duty of his Allegiance, againſt the Peace, and alſo againſt the Form of the Statutes.*] This Concluſion contains in it four Parts, and none of them is true. *Firſt*, that the Guards are for *Preſervation of the Kings Perſon.* It will be an eaſier matter to find a World in the Moon, than that the Law has made the *Guards* a lawful Force, or any Statute that has Eſtabliſhed any Force, particularly for the Guard of the King's Perſon. And tho' the Law had eſtabliſh'd any ſuch Force; yet it was not done by the 25 *Ed.* 3. and therefore in this the Indictment concluded falſly.

The *Second* thing is this, That to ſeize and deſtroy the *Guards* was againſt the *Duty* of his *Allegiance*. To ſpeak fully to the Nature of *Allegiance*, would require a long Diſcourſe. But a few words will lay this upon it's back. It cannot be deny'd, that Nature and the Law did nothing in vain. And if ſo, can it be imagined that the Law would eſtabliſh ſuch a thing as the *Guards*, which had made ſo much a better Proviſion for the Preſervation of the King's Perſon, even the Duty and Intereſt of every one of his Subjects? In the next place, *Subjection* and *Protection* are Convertible Terms, and therefore if the Subjects do not receive Protection by the *Guards*, it is not againſt their *Allegiance* to ſeize and deſtroy them; whereas to ſeize the *Militia* is againſt their *Allegiance*; becauſe they receive *Protection* by them. Beſides, no man becomes an Offender, till the Law has been promulged ſo, as that no man can reaſonably be ſuppos'd to be ignorant of it. Now then, though the King by his Commiſſion might make the *Guards* ſuch a lawful Force; yet *non conſtat* that they are ſo Commiſſion'd by him. For it has not been

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publiſh'd in that due manner and form, as that the Nation can regularly take notice of it. And beſides, there is no Record entred, or remaining of it in any Court, or any other Place, whereby the People may come to a certain knowledge of it. Which is alſo a forceable Argument againſt the *Legality* of ſuch a Commiſſion. So that though in other Caſes *Ignorantia Juris* is not allow'd ; yet in this Caſe it is a very good Plea, That it was not againſt my Lod *Ruſſel's Allegiance* to ſeize the *Guards*, though the King's Commiſſion did make them a lawful Force.

The *Third* thing is, *That it was againſt the Peace*, which is an untrue Concluſion. For it is not againſt the Peace to ſeize any Force that is not countenanced by Law. And a Needle may ſooner be found in a Cart-Load of Hay, than any Statute that has Eſtabliſh'd the *Guards*. And if the King's Commiſſion can make a Force a lawful Force, then it's hard to ſay, whether the Rebellion in *Ireland*, did not act upon ſufficient Authority, ſince no clear Anſwer has yet been made to the Commiſſion under the Broad Seal, which the Rebels produced, to juſtifie their Proceedings. In the next place, every Treaſon is againſt the Peace. But to conclude, becauſe it is againſt the Peace, therefore it is Treaſon, is neither Law, nor Reaſon. For every Offence is againſt the Peace: but every Offence is not Treaſon. Furthermore, the King's Lawful Commiſſion is not to be oppoſed in any Caſe: and the Indictment upon it will run, that it is *againſt the King's Crown, and Dignity, and againſt the Peace.* Therefore to conclude, that it is Treaſon, is a *non ſequitur*. For it is not Treaſon in many Caſes to Seize and Deſtroy thoſe that Act by the King's Lawful Commiſſion.

The *Fourth* thing is, that it was *againſt the Form of the Statutes.* The Statutes thus mention'd muſt be thoſe Statutes, or at leaſt muſt comprehend ſome Statute, that ſettles the Guards for the Preſervation of the King's Perſon: For the *Seizing of the Guards, is the Overt Act* aſſign'd of *Compaſſing the King's Death.* Now if there be no ſuch Statute, then is this Part of the Concluſion of the Indictment alſo falſe. And conſequently the Judgment againſt my Lord *Ruſſel* ought to be revers'd.

FINIS.